Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 30, 2010

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THIS WEEK:

Search & Seizure

Bowden v. State, A10A0140

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court erred in denying his motion to suppress. The evidence showed that officers, who were looking for a fugitive, went to a home owned by the city housing authority and not the home of the fugitive. The officers asked that all individuals come outside and provide identification, which they did. The fugitive was not one of those individuals. The officers then obtained permission from the director of the housing authority to enter the residence to search for the fugitive. Once inside, marijuana was discovered and appellant, who was one of the individuals at the residence, claimed ownership of the contraband.

Appellant argued that the officers lacked a valid consent to enter the residence. The Court agreed and reversed. The Court found that the director of the housing authority was a landlord and the status of landowner and/or landlord does not in itself give one the authority to consent to a search of a tenant's residence. The State nonetheless contended that the director's consent was authorized by the terms of the tenant's lease, which allegedly provided that the director could enter the premises in the event of a threat to the health and safety of the residents or the property. But, the Court found, a copy of the lease was not tendered into evidence in the trial court and so the State failed to meet its burden on this front. But in any event, the record was devoid of any evidence that the fugitive was a dangerous individual, or that the officer's failure to immediately locate and arrest the fugitive posed a threat to the health and safety of the residents or the property. Moreover, it was irrelevant whether the officer believed in good faith that the director possessed the power to consent to the search. Appellant's conviction was therefore reversed.

State v. Nesbitt, A10A0610

The State appealed from the grant of defendant's motion to suppress. The evidence showed that the officer observed a vehicle being driven in a manner that suggested that the driver was impaired. He initiated a traffic stop. The car turned into an apartment complex and pulled into a parking spot. The driver got out of the car, left the door open, looked back at the officer and took off running, ignoring the officer's oral commands to stop. As he ran, he dropped items later determined to be a digital scale and a bag of suspected cocaine. The officer searched the car and came upon the name "Nesbitt." He subsequently determined, based

on an investigation from items found in the car that the driver, who was not the registered owner of the car, was the defendant. The trial court granted the motion to suppress, finding that the initial stop of the vehicle was not supported by a reasonable articulable suspicion.

On appeal, the State did not contend that Nesbitt's driving maneuvers authorized the stop. Instead, the State argued that irrespective of the legality of the stop of the vehicle, the seized evidence was not tainted as fruit of an illegal under the theory of abandonment. Specifically, the State's only argument was that in fleeing the traffic stop on foot, Nesbitt abandoned the vehicle for Fourth Amendment purposes. The Court found that this is not a case in which a defendant fled a car that was illegally parked or parked in some hazardous manner. In such instances, the Court has found that the defendant abandoned the vehicle. Here, however, Nesbitt parked the car in a parking spot in his apartment complex. The Court "decline[d] to hold that flight on foot by a driver (and passengers, if any) from a vehicle recently pursued by the police automatically justifies a search of that vehicle." It found that while Nesbitt was careless and impudent in leaving his car door open while he ran away, it would not consider that his actions supported a conclusion that he had cast the vehicle aside, relinquishing his interest it. Therefore, Nesbitt did not abandon his vehicle under the Fourth Amendment.

As to the items that Nesbitt dropped as he ran from the officer, the Court held that these items were indeed abandoned by him. However, evidence adduced at the suppression hearing showed that the officer ascertained Nesbitt's identity, and thereby connected him to the abandoned evidence, based upon the items found during the search of the vehicle and the search of the vehicle was unlawful. Because the evidence from which the officer ascertained Nesbitt's identify derived from documents found during the unlawful search of the vehicle, the trial court did not err in rejecting the State's argument that the items retrieved from the sidewalk are admissible in a trial against Nesbitt.

The Court, in so holding, noted that the State did not attempt to justify the search of the car as an inventory search; that the search was valid under the "automobile exception" to the search warrant requirement; nor that any of the evidence retrieved from the car was seized pursuant to the plain view doctrine. Moreover, the Court found that the evidence was not admissible under the independent source doctrine. Accordingly, the trial court's suppression order was affirmed.

Ineffective Assistance of Counsel; Padilla v. Kentucky

Taylor v. State, A10A0026

Appellant plead guilty to two counts of child molestation. He contended that the trial court erred in denying his motion to withdraw his guilty plea. Specifically, he claimed that his counsel was ineffective for failing to advise him that his plea would subject him to the requirements of registering as a sex offender. The trial court denied the motion, finding that the registration requirements were a collateral consequence of the guilty plea and therefore the failure to advise of these matters did not constitute ineffective assistance of counsel.

The Court reversed, citing *Padilla v. Kentucky* , __U. S.__ ,130 SC 1473, 176 LE2d 284 (2010). In *Padilla*, the United States Supreme Court held that constitutionally competent counsel must advise their non-citizen clients whether their guilty plea carries a risk of deportation. The *Padilla* Court determined that deportation is "intimately related to the criminal process" in that it is "nearly an automatic result" following certain criminal convictions; deportation is a "drastic measure" which is the "equivalent of banishment or exile."; and the terms of the relevant immigration statute were "succinct, clear, and explicit" as to the consequences of the defendant pleading guilty. Here, the Court found, sex offender registration is like deportation because registration as a sex offender is "intimately related to the criminal process" in that it is an "automatic result" following certain criminal convictions; registration as a sex offender, like deportation, is a "drastic measure" with severe ramifications for a convicted criminal; and the terms of the sex offender registry statute were "succinct, clear, and explicit" in setting forth the consequences of appellant's guilty plea; and his trial counsel could have readily determined that appellant was required to register and conveyed that information to him. Therefore, the Court remanded for a determination of whether trial counsel had in fact advised appellant of the registration requirements and if not, whether the failure to do so prejudiced him.

Search & Seizure; Recidivist Sentencing

Wilder v. State, A10A0059

Appellant was convicted of child molestation, sexual exploitation of children, aggravated child molestation and statutory rape. He was sentenced as a recidivist to two consecutive life sentences plus 60 years. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the victim and a woman named Quick told an officer that appellant had a briefcase containing videotapes of the victim and appellant engaging in sex acts, and that the briefcase was at the home of appellant's friend, Malin. Malin testified that appellant had been at her home with the victim on one occasion, and that on another occasion, appellant left a locked briefcase at her home and told her he would "pick it back up later." The officer had Quick get the briefcase from Malin's home and bring it to him. The officer then obtained a search warrant for the briefcase and searched it.

The Court held that the State cannot avoid a Fourth Amendment challenge to a search and seizure by asking a private citizen to act on its behalf and seek out evidence. Such a search would be conducted in concert with law enforcement authorities, thus triggering the safeguards of the Fourth Amendment. The test is whether the private individual, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the government when she produced the evidence. The Court found that law enforcement used private citizens to obtain possession of the briefcase. However, the investigating officer became aware of the existence of the briefcase and its contents based upon the statements of the victim and Quick, and was able to obtain a search warrant for the contents of the briefcase based upon this information. Because the contents of the briefcase were seized pursuant to a valid search warrant based upon information wholly independent from law enforcement's illegal use of Malin and Quick to obtain the briefcase, it met the criteria for admissibility under the independent source doctrine.

Appellant also contended that the trial court erred by sentencing him as a recidivist because the conviction used was not final. The record revealed that the State gave notice of its intention to seek recidivist punishment

based upon a jury previously finding appellant guilty of child molestation, aggravated child molestation, and aggravated sexual battery in Pauling County. The trial court sentenced him on all counts pursuant to the State's notice. "[A] prior conviction must be final before it can be considered for purposes of imposing recidivist sentencing." A conviction is not final until the defendant has been adjudicated guilty and has been sentenced, and no appeal on the prior charges remains pending. The record revealed that when appellant was sentenced on April 18, 2007, a motion for new trial was pending in the Paulding County case. Because his conviction in that case was not final, it could not be used as a basis for recidivist sentencing in this case. Although the State argued that appellant purposefully delayed finalization of his Paulding County conviction and therefore forfeited his right to complain of his sentence, the Court held that the requirement that a previous conviction be final before being considered for enhanced punishment is a bright-line rule. "We find no authority for taking exception to that rule and decline to create an exception here." Therefore appellant's sentence was vacated and the case remanded for resentencing.

Sentencing

Stephens v. State, A10A0223

Appellant was convicted of three counts of aggravated child molestation, one count of rape, and one count of incest. He argued that the trial court erred in its sentencing of him. The record showed that at the sentencing hearing on December 12, 2008, the trial court stated that appellant would be sentenced to 20 years, with the first 10 years to be served in confinement and the balance on probation; while on probation, he would pay a fine and a probation fee, and would have no contact with the victim. The trial court then added that he was "going to impose the sexual offender conditions as part of the sentence." The sentencing order signed by the court December 12 and filed December 16 provided, among other things, that as a special condition of his probation, appellant was required to register as a sex offender as required by OCGA § 42-1-12, undergo sex offender evaluation and treatment at his own expense, and have no contact with the victim. On December 15, the trial court entered an order, filed on December 16, entitled "ADDENDUM TO SENTENCE[:] SPECIAL CONDITIONS OF PROBATION AND PAROLE." In this order, the trial court prohibited appellant from engaging in a number of activities; imposed a Fourth Amendment waiver; and required him to 1) maintain a driving log; 2) obtain advance approval from the probation department before renting a post office box; and 3) not hitchhike or pick up hitchhikers.

Appellant argued that the trial court lacked authority to impose any conditions upon his parole. The Court found that there was no reference in the sentencing document to parole other than the heading. Nonetheless, any attempt by a court to impose its will over the Executive Department by attempting to impose as a part of a criminal sentence conditions operating as a prerequisite of or becoming automatically effective in the event of a subsequent parole of defendant by the State Board of Pardons & Paroles would be a nullity and constitute an exercise of power granted exclusively to the Executive. Because the addendum to the sentence purported to impose restrictions upon appellant's future parole (if granted), the sentence was a nullity. Therefore the sentence was vacated and the case remanded for resentencing.

Garza; Ultimate Issue

Humphries v. State, A10A1132

Appellant was convicted of kidnapping with bodily injury, rape, aggravated sodomy, and aggravated assault. He contended that that the evidence was not sufficient to support his conviction for kidnapping because the State failed to establish the essential element of asportation. The evidence showed that the victim was standing in a lighted area on a golf course near the clubhouse. Appellant grabbed her, dragged her down a steep hill to an unlit, rather dark, wooded area and sexually assaulted her. At one point, she tried to get away by running up the hill, but appellant caught her, dragged her back down the hill and sexually assaulted her again. The Court found that the evidence under *Garza*, was sufficient to prove asportation. Even though the record did not specify the duration of this movement, the record showed that the movement was not an inherent part of the other, separate crimes of rape, aggravated sodomy, and aggravated assault. Further, the movement that occurred presented a significant danger to the victim independent of the danger posed by the other offenses, by further enhancing her attacker's control over her. By dragging the victim down the hill, away from a more lighted place to a darker and more isolated place, appellant reduced the possibility of her obtaining help from others or of her making an escape. In fact, the Court noted, her subsequent effort to flee up the hill was unavailing.

Appellant also contended that the trial court erred in allowing the officer investigating the alleged assault to testify that the victim's appearance was consistent with her story because such testimony went to the ultimate issue. The Court disagreed. The investigator was not asked if appellant was guilty of the assault on the victim; she was asked to describe the physical evidence she observed when she met the victim at the hospital. She was then asked if the victim's injuries and condition were consistent with the story the victim gave. Testimony that the victim's injuries were consistent with the allegations of assault is admissible and does not invade the province of the jury; "the fact that such testimony may also indirectly, though necessarily, involve the [victim's] credibility does not render it inadmissible."

Venue

Lee v.State, A10A1419

Appellant was convicted of aggravated sodomy. Appellant contended that the State failed to prove venue in Effingham County. The evidence showed that the crime occurred at the victim's home at 220 Griffin Road, Guyton. The Court held that evidence that the crime took place in Guyton is insufficient to prove venue in Effingham County. "[P]roving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue." The fact that the prosecutor, in opening argument stated, "I live down here in Guyton. I live in Effingham County," was also not sufficient because it was not evidence. The record also showed that a nurse trained in the treatment of sexual assault victims took the victim's history at Candler Hospital in Savannah, Chatham County. The sexual assault report based on that history noted the victim's address as follows: "P. O. Box 343, 220 Griffin Rd (physical address), Guyton, GA, Effingham [County], 31312." The report was introduced into evidence as

State's Exhibit 4 without objection. However, the State objected to Exhibit 4 as violating the continuing witness rule and the trial court excluded Exhibit 4 from evidence. Since that portion of Exhibit 4 concerning the victim's address in Effingham County was not read into the record, and the State successfully moved to exclude the entire exhibit from the jury's consideration, the relevant portion of the exhibit could not provide a sufficient basis for a finding that venue lay in Effingham County. Likewise, the Court found, at no point did the nurse give any evidence that the *crime* occurred in Effingham County; instead, the nurse merely confirmed the prosecutor's statements that the "victim" and her "case," whether legal or medical, had come to Candler Hospital from that county. Therefore, the conviction was reversed. Nevertheless, the Court added, if a criminal conviction is reversed because of an evidentiary insufficiency concerning the procedural propriety of laying venue within a particular forum, and not because of an evidentiary insufficiency concerning the accused's guilt, retrial is not barred by the Double Jeopardy Clause.

Constitutional Speedy Trial

Franklin v. State, A10A0019

Appellant appealed from the denial of his motion to dismiss his indictment for armed robbery and aggravated assault on constitutional speedy trial grounds. The facts are long and complicated. But briefly, appellant was originally charged in 1979 with armed robbery and aggravated assault. He escaped and in the process, committed other crimes, including kidnapping and murder. After he was convicted of the kidnapping and murder and given a death sentence, the State dead docketed the armed robbery and aggravated assault. All this occurred in 1979. His conviction was set aside in 1983 and he was retried and sentenced to life in 1985. In 2006, he was notified that he was to be paroled. To prevent appellant from gaining his release from prison, the State then successfully revived his case off the dead docket. Appellant's parole was cancelled. He moved to dismiss in March, 2007. A hearing was held in 2007, but a ruling by the trial court was not made until April, 2009.

Utilizing the *Barker-Doggett* four factor analysis, the Court first determined that the delay, being well over 5 years, was presumptively prejudicial. The vast reason for the delay was found by the Court to be attributable to the State resulting from the State's decision to dead docket the case and preserve its right to prosecute appellant at a later time. The Court held that appellant's failure to assert his speedy trial rights during the time the case was dead docketed (May 1979 until January 2007) cannot be held against him. However, he did not assert his right to a speedy trial during the four-month period after he was first indicted until the charges were dead-docketed. Likewise, he did not promptly demand a speedy trial after the removal of the case from the dead docket. Finally, his escape demonstrates that he wanted to avoid a trial, instead of seeking a speedy one. When the period of time the case was placed on the dead docket is removed from consideration, appellant's failure to demand a speedy trial for a total period of approximately seven months does not demonstrate a demand for a speedy trial in due course. This factor therefore was weighed against appellant. The last factor, prejudice, was also weighted against appellant because he confessed under oath to the armed robbery and aggravated assault charges during his murder trial. He also testified that he "admitted to everything from the beginning" at the time of his arrest. He further acknowledged that he never planned to defend himself and that he had not lost any witnesses that would have helped him defend the case because there were no witnesses who could help him. Therefore, appellant's own testimony affirmatively proved that the delay left his ability to defend himself unimpaired. In balancing the factors, the Court determined that the trial court did not err in denying the motion to dismiss.

DUI; Discovery

State v. Tan, A10A0687

Tan was charged with DUI. The State appealed from an order suppressing the breath test slip from the Intoxilyzer 5000 and all testimony regarding the intoxilyzer. The evidence showed that Tan initially agreed to a breath test, but then kept spitting out the mouthpiece and eventually, the Intox 5000 timed-out, producing a breath test slip showing an insufficient breath sample. Tan moved to suppress the evidence regarding the slip and the breath test because the slip was not produced in discovery under OCGA § 17-16-23 as a scientific report within 10 days of trial. The trial court agreed and suppressed the evidence.

The Court reversed. The breath test slip in this case does not constitute a written scientific report within the meaning of OCGA § 17-16-23. Under OCGA § 17-16-23 (a), a written scientific report subject to discovery "includes, but is not limited to, . . . blood alcohol test results done by a law enforcement agency or a private physician; and similar types of reports that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal against the defendant." An intoxilyzer measures a person's blood alcohol concentration from a breath sample given by blowing into the machine, which then produces a printout of the test results. Thus, an intoxilyzer printout showing the results of the instrument's analysis of the blood alcohol concentration in a defendant's breath would be subject to discovery under OCGA § 17-16-23. Here, however, no test or analysis was performed because the sample was insufficient, and the breath test slip does not show any test results. It reflected only a measurement of breath volume. There was no analysis by the instrument of that breath volume. Accordingly, the Court concluded, a printout reflecting an "insufficient sample," and thus no analysis and no result, is not subject to discovery under OCGA § 17-16-23.

Impeachment

Lawrence v. State, A10A0603

Appellant was convicted of hijacking a motor vehicle, two counts of aggravated assault with intent to rob, and two counts of armed robbery. He contended that the trial court erred in allowing the State to impeach him with his prior convictions without making a finding that the probative value of that evidence outweighed the prejudicial effect. OCGA § 24-9-84.1 (a) (2) provides: "Evidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant." The trial court ruled that "this impeachment would be more probative than prejudicial." But, the Court held, OCGA § 24-9-84.1 (a) (2) requires the court to determine whether the probative value of admitting the

evidence *substantially* outweighs it prejudicial effect. The Court noted that in OCGA § 24-9-84.1 (a) (1), governing impeachment of a witness, the word "substantially" is omitted, Where the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. Therefore, the legislature, in using the word "substantially" in OCGA § 24-9-84.1 (a) (2) for the impeachment of a defendant, intended to create a standard different from that provided from the impeachment of a witness. Here, the trial court found that the probative value of appellant's prior convictions outweighed the prejudicial effect. But, the trial court was not authorized to admit evidence using a more liberal standard than that provided by OCGA § 24-9-84.1 (a) (2).

Nevertheless, the error was subject to scrutiny for harmless error and a new trial was not automatically required. The Court then held that the error was harmless in light of the overwhelming evidence of appellant's guilt.

Search & Seizure; Judicial Comment

Nelson v. State, A10A0713

Appellant was convicted of trafficking in cocaine. Appellant contended that the trial court erred in denying his motion to suppress. The Court found that OCGA § 17-5-30 establishes a procedure for suppression of evidence obtained by unlawful search and seizure. It specifically provides that a motion to suppress evidence illegally seized "shall be in writing and state facts showing that the search and seizure were unlawful." Here, appellant filed no such motion, but asserted an oral motion at trial. An oral objection to evidence obtained by what is claimed to be an unlawful search and seizure is not sufficient unless the trial court previously suppressed the evidence pursuant to a motion to suppress in compliance with OCGA § 17-5-30. Therefore, the Court held, insofar as appellant's oral objection at trial on Fourth Amendment grounds can be considered a motion to suppress tangible evidence, it was improper because it was not made in writing.

Appellant also contended that the trial court erred in denying his motion for a mistrial based on the trial judge's alleged violation of OCGA § 17-8-57. The record showed that the trial court, in response to the prosecutor's question concerning admitted exhibits, stated "[Exhibit] 1 was the cocaine, 2 and 3 were the [drug dog training] certificates, and 4 was the Miranda form." Appellant argued that this was a judicial comment that the State proved that the drug was in fact cocaine. The Court held that while it is true that the trial court may not express an opinion as to what has been proved, where only one inference is possible from the evidence it is not improper for the court to assume the fact to be true. Here, a relevant fact, other than the essential one of guilt or innocence, was established by uncontradicted evidence. That fact —that the substance seized was cocaine —was not contradicted. Indeed, the Court noted, appellant himself admitted that the substance was cocaine when he took the stand in his own defense.